STATE OF MICHIGAN

COURT OF APPEALS

RONALD A. PATTERSON, JR., Plaintiff-Appellant,	UNPUBLISHED September 15, 2015
v	No. 322135 Clinton Circuit Court
ST. JOHN'S BOARD OF EDUCATION, KENNETH ASHLEY LADOUCEUR, SHELBI FRAYER, JEFFREY CANTRELL and EARL LAMERAND, Defendants-Appellees.	LC No. 12-011073-CZ

Before: BORRELLO, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this defamation case, plaintiff appeals as of right an April 24, 2014, trial court order wherein the court granted defendants' second motion for summary disposition and dismissed plaintiff's last remaining claims against defendants Jeffrey Cantrell and Earl Lamerand. For the reasons set forth in this opinion, we affirm.

I. FACTS

This case arises from the demolition of a school building and allegations that, with permission from plaintiff, defendants Cantrell and Lamerand, maintenance workers for the St. John's School District (the District), salvaged approximately $10,000 worth of copper scraps from the building for personal gain.

In October 2011, plaintiff, a retiree of the District, was employed by the District as an independent contractor to serve as director of operations. During that time period, defendants Cantrell and Lamerand worked under plaintiff and assisted in preparing a building for demolition by a private contractor. At some point during the demolition prep, defendant Kenneth Ladouceur, superintendent of the District, commenced an investigation after he received an anonymous tip that copper theft was occurring at the worksite. Cantrell and Lamerand admitted taking copper and selling it at a value of nearly $10,000, but they both alleged that plaintiff gave them permission to take the copper. Following an investigation by the Michigan State Police (MSP), none of the men were criminally charged, but the District terminated its contract with plaintiff and disciplined Cantrell and Lamerand. On the day of the termination, defendant Shelbi Frayer, the District's business manager, escorted plaintiff out of the building.

On September 18, 2012, plaintiff commenced this lawsuit by filing a complaint alleging defamation (Count 1), intentional infliction of emotional distress (IIED) (Count 2), tortious interference with contractual relations (Count 3), and gross negligence (Count 4). Specifically, plaintiff alleged that defendants, "while acting outside of the scope of their official capacity(s)" "communicated to other persons in the community that Plaintiff was involved in the copper theft." Plaintiff alleged that defendants' false accusations prevented him from obtaining reinstatement at the District or employment with other school districts.

On January 14, 2013, defendants' moved for summary disposition. Defendants argued that the complaint should be dismissed as to defendant the Board pursuant to MCR 2.116(C)(7) and (8) for want of jurisdiction. Defendants argued that because the Board was the board of a "general powers" school district under the Revised School Code (RSC), it lacked the legal capacity to sue or be sued. In the alternative, defendants argued that the Board enjoyed absolute immunity from tort liability.

With respect to the individual defendants, defendants argued that plaintiff's claims were barred by governmental immunity. Specifically, defendants argued that Ladouceur had absolute tort immunity while Frayer, Cantrell and Lamerand had qualified tort immunity for any actions taken within the scope of their authority. Defendants argued, in part, that all of the alleged defamatory statements, which were the root of all plaintiff's claims, occurred during the course of the investigation and therefore were not actionable. Defendants also argued that plaintiff failed to allege facts to support a gross negligence or IIED claim.

Following oral argument, the trial court granted defendants' motion in part and denied it in part. The court reasoned that summary disposition was appropriate as to defendant the Board for lack of jurisdiction, reasoning that the Board was an entity that "can neither sue, nor be sued." Additionally, leave to amend and replace the Board with the District would be futile because the District was "absolutely immune from any kind of liability."

The court proceeded to grant summary disposition in favor of Ladouceur. The court reasoned that Ladouceur had absolute immunity from liability because he conducted the investigation in the course of his duties as superintendent, reasoning that the investigation required discretionary decisions that were not subject to challenge. The court also granted summary disposition as to defendant Frayer on grounds that she had qualified immunity. The court reasoned that none of plaintiff's allegations suggested that Frayer acted maliciously or that her conduct amounted to gross negligence.

Finally, with respect to defendants Cantrell and Lamerand, the trial court denied defendants' motion for summary disposition as to the defamation and gross negligence claims. The court reasoned that plaintiff alleged sufficient facts to establish an "intentional, malicious act" such that his claim should proceed against those two defendants. In short, the court dismissed all of plaintiff's claims except for the defamation and gross negligence claims as to Cantrell and Lamerand.

Thereafter, the parties engaged in additional discovery and several witnesses gave deposition testimony. The following is an overview of that testimony:

Cantrell testified that in the summer of 2011, the District's maintenance staff was clearing out a "math pod" building before a demolition contractor was scheduled to demolish the building. Cantrell testified that after the initial clearing was accomplished, during a morning maintenance staff meeting, he asked plaintiff whether the maintenance workers could salvage what was left in the building and plaintiff replied that they could. Cantrell testified that when plaintiff gave permission to salvage, he figured that plaintiff meant that the workers could take scrap material on their own time for their own personal gain. Cantrell testified that he salvaged copper from the building during evenings, weekends and during the day when he took vacation time. He sold the copper at a scrap yard for about $4,300. Cantrell explained that after Ladouceur asked about the copper, plaintiff requested that Cantrell bring some copper into the maintenance barn to make it appear that the copper had not been taken. Cantrell stated that he told his union reps, police, Ladouceur and one maintenance worker from DeWitt that he had permission to salvage the copper.

Similarly, Lamerand testified that he was part of the maintenance crew that went through the math pod and removed items that the District could reuse. Lamerand testified that plaintiff told him personally that he could salvage copper from the building and he was present in the staff meeting when plaintiff gave permission to Cantrell to salvage what was left in the building. Lamerand testified that he told his coworkers, his wife, the police, Ladouceur, Frayer and four maintenance workers from DeWitt that plaintiff gave him permission to scrap the copper. Lamerand testified that plaintiff instructed him to bring some scrap copper into the maintenance barn because Ladouceur was inquiring about the copper. Lamerand cut up some copper tubing and placed it in a barrel in the maintenance barn early on a Monday morning. Lamerand testified that he honestly believed that he had permission to take the copper and he was not under the impression that he had to remit the money from the copper scraps back to the District.

Duane Haviland testified that he was a maintenance worker who participated in the demolition prep work. Haviland testified that during one maintenance staff meeting, Cantrell asked plaintiff if the workers could salvage stuff at the worksite and, according to Haviland, plaintiff responded, "yes, go ahead and do it." Specifically, Haviland testified that he recalled plaintiff stating, "I'd just as soon see you guys with it than anybody else."

Ladouceur testified that he spoke with plaintiff after receiving anonymous letters about copper theft at the demolition site. According to Ladouceur, plaintiff stated, "I don't know nothing about nothing." Ladouceur later called the MSP to investigate because of the amount of the alleged theft. He explained that Lamerand and Cantrell were very open and honest about their salvaging the copper and they were not terminated because of their honesty. Ladouceur testified that on one Friday afternoon, he walked through the maintenance barn with Frayer and plaintiff after plaintiff indicated that the workers had placed the scrap copper in the barn. When the three did not find any copper in the barn, plaintiff indicated to Ladouceur that the workers must have "done something" with it and that he would get it back by Monday morning. On the ensuing Monday morning, plaintiff walked through the barn with Ladouceur and showed him a blue barrel with some copper scrap in it. Ladouceur testified that plaintiff was terminated because he lied by stating that he did not know anything about the salvaging and because plaintiff attempted to mislead him when he represented that the barrel contained the missing copper. Ladouceur testified that he was not aware of a "slush fund," and if he had known about one, he would have put a stop to it because the fund would have been improper.

Officer Jay Barkley of the MSP testified that he investigated the copper theft. He explained that Cantrell and Lamerand cooperated and gave him receipts from the scrap yard and his investigation revealed that they salvaged copper in plain view of several surveillance cameras. In contrast, plaintiff's statements were inconsistent and plaintiff denied giving his workers permission to salvage the copper.

Plaintiff testified that he told the maintenance workers that they could salvage on their own time, but only if they remitted the money to the maintenance department's "slush fund" that was used to pay for parties. Plaintiff testified that it was longstanding department policy that the workers could salvage on their own time if they remitted the proceeds to the slush fund. Plaintiff denied that he gave the workers permission to keep the money from the copper scraps.

Following this additional discovery, defendants Cantrell and Lamerand again moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Defendants Cantrell and Lamerand argued that plaintiff's defamation claims failed because Cantrell and Lamerand's statements that plaintiff gave them permission to salvage the copper and keep the proceeds did not harm plaintiff's reputation "any more than what plaintiff claims was the true situation, i.e. that he gave defendant's permission to salvage the copper provided it was done on their own time and that the money was kept in the maintenance department 'slush fund.'" Moreover, defendants Cantrell and Lamerand were immune because they were "acting within the scope of their duties when the statements were made to the superintendent and the police during investigations of the alleged theft," and their conduct did not amount to malice.

Following oral arguments, on April 24, 2014, the trial court entered an opinion and order granting summary disposition as to defendants Cantrell and Lamerand. The court held that Cantrell and Lamerand's statements to the police were "absolutely privileged" and could not form the basis for a defamation claim. The court proceeded to conclude that, regarding statements made to the superintendent or other school employees, those statements were made in the course of defendants' employment as part of "the governmental function of investigating the loss of copper owned by the school district," and were barred by governmental immunity.

Finally, to the extent plaintiff's defamation claims were based on alleged statements made to third parties, the court concluded that plaintiff failed to submit evidence to create an issue of fact in support of the claims. Specifically, the evidence showed that any third-parties were "only told that the defendants had been given permission to salvage the copper, a fact not in dispute," but "there is nothing to fairly suggest that the defendants said they were told they could sell the copper and retain the proceeds." This appeal ensured.

II. STANDARDS OF REVIEW

Plaintiff challenges the trial court's orders granting both defendants' motions for summary disposition as to defendants Ladouceur, Frayer, Lamerand and Cantrell. [1]

We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 8174 (1999). The trial court granted summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Summary disposition is proper under MCR 2.116(C)(7) where a party enjoys immunity under the law. "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Trans*, 288 Mich App 267, 271; 792 NW2d 798 (2010). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Id*. (quotation marks and citations omitted).

Summary disposition is proper under MCR 2.116(C)(8) where the alleged claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119 (quotation marks and citations omitted). Summary disposition is proper under MCR 2.116(C)(10) where, when viewed in a light most favorable to the non-moving party, "the proffered evidence fails to establish a genuine issue regarding any material fact. . . ." *Id*. at 120.

III. ANALYSIS

A. DEFENDANTS LADOUCEUR AND FRAYER

In his first issue presented, plaintiff contends that the trial court erred in dismissing defendants Ladouceur and Frayer on grounds of "absolute and qualified immunity."

With respect to defendant Ladouceur, it is undisputed that Ladouceur was the superintendent of the District. As superintendent, Ladouceur enjoyed absolute immunity from tort claims under the Government Tort Liability Act (GTLA), MCL 691.1401 et seq. Specifically, MCL 691.1407(5) provides as follows:

> A judge, a legislator, and the elective or *highest appointive executive official* of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. [Emphasis added.]

"[T]he superintendent of [a] school district is . . . absolutely immune from tort liability under MCL 691.1407(5)." *Nalepa v Plymouth-Canton Cmty Sch Dist*, 207 Mich App 580, 589; 525 NW2d 897 (1994). The relevant inquiry as to whether MCL 691.1407(5) shields a

[1] Plaintiff does not specifically address or challenge the trial court's grant of summary disposition in favor of Defendant St. Johns Board of Education.

superintendent from liability is whether the alleged wrongful conduct occurred when the superintendent was acting within the scope of his or her authority. See *American Transmissions v AG*, 454 Mich 135, 142; 560 NW2d 50 (1997).

Plaintiff's complaint contained vague allegations regarding statements that defendants allegedly made to, largely, unidentified third parties. The only specific allegation referencing Ladouceur alleged that the superintendent, "under color of authority, made a cursory investigation into the theft of copper."

It is uncontested that Ladouceur, as the superintendent, was the highest appointed executive official of the District. Ladouceur was responsible for all of the operations of the District. His title was indicative of the scope of his authority and, based on the complaint alone, the trial court could have reasonably inferred that Ladouceur's responsibilities included investigating alleged fraud and misconduct, interacting with investigators and other school superintendents, employee retention and discipline, and interacting with the community and the media regarding events and ongoing investigations within the District. See e.g. *Kefgen v Davidson*, 241 Mich App 611, 618-619; 617 NW2d 351 (2000) (noting that the doctrine of absolute privilege has been extended to communications made in certain circumstances in furtherance of an official duty).

Plaintiff's vague allegations did not establish facts to support that the challenged statements were made outside the scope of Ladouceur's authority as superintendent. Plaintiff did not dispute that Ladouceur had a central role in the investigation of the alleged copper theft and even admitted that Ladouceur acted "under color of authority," when he allegedly made a "cursory investigation into the theft of copper." Indeed, read as a whole, the complaint indicates that the gravamen of plaintiff's claims turned on the superintendent's conduct during the course of the investigation into the copper theft. See *Adams v Adams (On Recon)*, 276 Mich App 704, 710–711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.") It cannot be disputed that Ladouceur had broad authority to oversee the investigation, to contact and communicate with police about the investigation, to communicate with employees about the investigation, or to communicate with other superintendents and the media concerning the investigation. As the superintendent, Ladouceur was the face of the District who was ultimately responsible for what occurred during the demolition of the school building. In short, because the allegedly defamatory statements were so closely aligned with the ongoing investigation, the facts in the complaint did not support that Ladouceur was acting outside the scope of his authority as superintendent when he allegedly made defamatory statements about plaintiff.

Moreover, "[a] plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 263; 833 NW2d 331 (2013). Here, plaintiff did not identify with any specificity language that Ladouceur allegedly used that was defamatory. Rather, the claims vaguely asserted that one of the named defendants made statements to, in large part, unidentified third parties implicating plaintiff in the theft. These allegations were not sufficient to show conduct that occurred outside the scope of Ladouceur's

authority as superintendent. As such, Ladouceur was entitled to absolute immunity, MCL 691.1407(5), and the trial court did not err in granting summary disposition as to Ladouceur.

With respect to defendant Frayer, the trial court determined that Frayer enjoyed qualified immunity. For lower-level governmental employees, the test set forth in *Ross v Consumers Power Co*, 420 Mich 467; 363 NW2d 641 (1984), governs whether the employee has immunity from intentional tort claims. *Odom v Wayne County*, 482 Mich 459, 470; 760 NW2d 217 (2008). Under the *Ross* test, a governmental employee is entitled to immunity where he or she has shown the following:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, *or were not undertaken with malice*, and
>
> (c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich at 480, citing *Ross*, 420 Mich at 467 (emphasis added).]

In this case, there were no facts that were alleged that supported that Frayer engaged in any malicious conduct. Moreover, even if summary disposition was premature after defendants' first motion, evidence produced during subsequent discovery showed that plaintiff admitted giving Cantrell and Lamerand permission to take the copper, but he disputed that he gave the workers permission to keep the funds from the copper. Instead, plaintiff stated that he directed the workers to remit the funds to a department "slush fund." Thus, statements implicating plaintiff in the copper theft were not false or defamatory.

In addition, plaintiff admitted that he was only aware of statements that Cantrell and Lamerand made to third parties and in his complaint he did not identify with any specificity defamatory statements that Frayer allegedly made. See *Doe 1*, 300 Mich App at 263. Therefore, even viewed in a light most favorable to plaintiff, there was nothing to support that Frayer made any defamatory statements or acted with malice. Given that plaintiff was not aware of any statements that Frayer made to third-parties, and given that all of his claims turned on the alleged defamation, there was no genuine issue of material fact to support any of plaintiff's claims against Frayer. Accordingly, summary disposition in favor of Frayer was proper under either MCR 2.116(C)(7) or (C)(10).

B. DEFENDANTS CANTRELL AND LAMERAND

Next, plaintiff argues that the trial court erred in granting defendants' second motion for summary disposition with respect to defendants Cantrell and Lamerand.

To establish a defamation claim,[2] a plaintiff must prove the following elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

In this case, not only did plaintiff fail to plead his defamation claims with the requisite specificity, at best, viewed in a light most favorable to plaintiff, the evidence showed that there was a misunderstanding between plaintiff and the maintenance workers regarding whether they could keep the money from the copper that they salvaged. There was no evidence to support that Cantrell and Lamerand acted maliciously or made false and defamatory statements about plaintiff. In their depositions, Cantrell and Lamerand testified that they told police officers, District officials, co-workers, and a few people outside the district that they had permission to take the copper. To the extent that statements were made to police, those statements were absolutely privileged and could not form the basis of a defamation claim. *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619; 396 NW2d 809 (1986). Moreover, given the apparent confusion regarding what was to be done with the proceeds from the copper, the evidence did not support that Cantrell and Lamerand's statements were false or made with malice. Thus, because Cantrell and Lamerand made statements to co-workers and District officials within the scope of their authority during the course of their employment, those statements were not actionable. *Odom*, 482 Mich at 480.

Similarly, with regard to statements allegedly made to third parties, there was no evidence to support that Cantrell and Lamerand made false or defamatory statements about plaintiff. Cantrell and Lamerand did not testify that plaintiff gave them permission to keep the money from the copper, and plaintiff did not offer any evidence to the contrary. The only evidence that plaintiff offered in support of his defamation claims was evidence that Cantrell and Lamerand told others that they had permission to take copper from the worksite, which was not in dispute following plaintiff's deposition testimony. Moreover, plaintiff cannot show how he would have been in any better of a position had Cantrell and Lamerand told third parties that plaintiff instructed them to remit money to a slush fund, given that such statements would have implicated plaintiff in embezzlement and graft. In short, there were no genuine issues of material fact to support that Cantrell and Lamerand made false or defamatory statements concerning plaintiff and the court did not err in granting summary disposition in favor of these defendants. *Mitan*, 474 Mich at 24.

Plaintiff also argues that the trial court erred in dismissing his IIED claims. However, given that there was no evidence to support that any of the named defendants made false or defamatory statements or engaged in malicious conduct, plaintiff cannot show that any of these

[2] Plaintiff's gross negligence claims turned on his defamation claims; therefore, to the extent that his defamation claims failed, plaintiff's gross negligence claims also failed.

defendants engaged in conduct that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *VanVorous v Burmeister*, 262 Mich App 467, 481-482; 687 NW2d 132 (2004) (quotation marks and citations omitted). Accordingly, his IIED claims failed as a matter of law. *Id*.

Affirmed. Defendants having prevailed in full, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell